

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY LEE PERKINS and U.S. POSTAL SERVICE,
POST OFFICE, Birmingham, AL

*Docket No. 03-1903; Submitted on the Record;
Issued November 14, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement effective August 10, 2002, on the grounds that she had no further disability causally related to her December 17, 1999 employment injury; and (2) whether the Office properly denied appellant's request for further consideration of her case on its merits.

The Office accepted that on December 17, 1999 appellant, then a 57-year-old casual clerk, sustained a second metatarsal fracture when a container fell on her left foot. Appellant stopped work on December 24, 1999 and did not return and her casual (temporary) appointment had expired effective January 28, 2000. Appellant received compensation benefits as appropriate.

On February 7, 2000 her treating physician, Dr. James L. Thomas, a podiatrist, noted that x-rays of her second metatarsal stress fracture showed good callus formation and no change in alignment. Dr. Thomas opined that appellant was doing quite a bit better symptomatically and could wear a rigid soled postoperative shoe.

On August 30, 2000 Dr. Thomas completed a Form CA-20 attending physician's report, indicating that appellant was able to resume regular work on May 1, 2000. However, Dr. Thomas noted that appellant complained of left foot pain and he ordered a magnetic resonance imaging (MRI) scan of her left foot.

By report dated August 31, 2000, Dr. Thomas reviewed the MRI scan results and noted that it stated that there was a fracture of the base of the second metatarsal and there were sclerotic changes visualized at the fracture site, with adjacent bone marrow edema in the base of the metatarsal. Dr. Thomas noted that there was no evidence of a nonunion, however, he recommended immobilization with a cast and crutches and the use of a bone stimulator.

On October 4, 2000 appellant was admitted to the hospital for a pulmonary embolus secondary to the fractured metatarsal, under the care of Dr. Emily Boohaker, a Board-certified internist. Appellant apparently had developed deep vein thrombosis due to immobilization and a clot broke off and lodged in her lungs.

On January 18, 2001 Dr. Thomas opined that appellant could return to work at a sedentary job only for three weeks then regular duty.

By report dated April 12, 2001, Dr. Thomas noted that appellant's most recent MRI scan showed progressive healing of her stress fracture, but he decided to continue a bone stimulator to aid in healing.

On June 7, 2001 Dr. Thomas noted that appellant still complained of some discomfort in her fracture site, but that it was improved since the last visit. He opined that appellant was at a point of maximal medical improvement and that he had nothing further on a nonoperative basis to offer her. Dr. Thomas noted that he was hesitant about bone grafting due to appellant's past pulmonary embolus.

On June 11, 2001 the Office accepted that appellant had developed a pulmonary embolus, causally related to her December 17, 1999 metatarsal fracture. The Office found that the embolus occurred due to prolonged immobilization due to appellant's fracture.

On November 27, 2001 Dr. Thomas noted that appellant's pain had improved but that she still had pain to deep palpation and pain when she was on her feet for an extended period of time.

On November 21, 2001 appellant underwent a functional capacity evaluation, which determined that appellant was capable of performing light work. Normal ranges of motion of the foot and ankle were noted, as was the lack of edema and some degree of hypersensitivity at the fracture site was noted to persist.

On February 6, 2002 the Office advised appellant that it had determined that a second opinion evaluation was required and it referred appellant, together with a statement of accepted facts and the relevant case record to Dr. Robert A. Sparks, III, a Board-certified orthopedist, for a rationalized opinion as to the extent of appellant's continuing disability.

By report dated February 27, 2002, Dr. Sparks reviewed appellant's factual and medical history, noted her present complaints and answered the Office's questions as follows. Dr. Sparks found no objective finding to support appellant's contention of the presence of pain; he opined that the fracture injury was completely resolved at that time without objective residuals; and he noted that appellant was perfectly capable of performing the duties described in the statement of accepted facts at that time. Dr. Sparks opined that no restrictions were required, that vocational rehabilitation was not required and that appellant had reached maximum medical improvement. He opined that appellant was currently able to perform her regular duties.¹ Dr. Sparks also noted that appellant's pulmonary embolism had completely resolved and that she had been discharged by her pulmonary physicians.

¹ A work restriction evaluation was completed recommending no limitations or restrictions.

On an April 4, 2002 form letter to Dr. Boohaker, she indicated that appellant was not still suffering from her pulmonary embolism.

Thereafter the Office determined that a conflict had arisen between Drs. Thomas and Sparks regarding whether appellant continued to have disability causally related to her fracture. On May 15, 2002 the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Keith W. Weaver, a Board-certified orthopedist, for resolution of the conflict.

By report dated May 29, 2002, Dr. Weaver reviewed appellant's factual and medical history, noted her present complaints and indicated that she had some subtle pain behaviors. Dr. Weaver opined that appellant's work-related injury had completely resolved and that radiologically the traumatic second metatarsal fracture had healed. He further opined that there were no residuals from the fracture preventing appellant from returning to her date-of-injury job. Dr. Weaver opined that appellant had reached maximum medical improvement and that she had no left foot limitations. By letter dated June 26, 2002, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that the weight of the medical evidence of record supported that her fracture had completely healed without residuals and that she could return to regular work. The Office found that the weight of the medical evidence was represented by the report of the impartial medical examiner, Dr. Weaver. Appellant was given 30 days, within which to object to such action.

By letter dated July 19, 2002, appellant objected to the proposed action claiming that medically her foot had not completely healed. Appellant claimed that she had constant pain and could not wear anything on her left foot except house slippers. Radiology reports of appellant's right foot and lumbar spine were also submitted.

By decision dated July 30, 2002, the Office finalized its preliminary determination finding that the weight of the medical evidence of record established that appellant had no further disability or injury residuals after August 10, 2002, causally related to her December 17, 1999 employment injury. The Office found that radiology reports documented healing of the accepted fracture and that the impartial medical examiner found no disability or residuals. It noted that pain was not compensable and that there were no objective symptoms of disability or residuals.

On August 13, 2002 appellant requested reconsideration of the termination of her benefits. Appellant claimed that she was still being treated for her injury due to the problems she continued to have.

By decision dated August 23, 2002, the Office declined to reopen for further review on its merits finding that she had not submitted evidence sufficient to warrant reopening the case for further consideration.

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that she had no further disability causally related to her December 17, 1999 employment injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁵ The Office has met its burden in this case.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

In this case, appellant's treating podiatrist, Dr. Thomas, opined that appellant had an ongoing need for the use of a bone stimulator and that she could only return to sedentary duty for three weeks prior to resuming regular duty. However, Dr. Sparks found that radiologically appellant had a completely healed fracture and had no evidence of objective disability and that she needed no further treatment or activity restrictions, as Dr. Sparks found that she was able to perform her regular duties.

A conflict was declared between Drs. Thomas and Sparks and the case was properly referred to an impartial medical specialist for resolution. The Board has held that where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁶

Dr. Weaver provided a well-rationalized medical report based upon a complete and accurate factual and medical background, in which he determined that, based on objective radiologic evidence, appellant's accepted second metatarsal fracture was completely healed without residuals and that she needed no left foot activity limitations. He found that appellant could return to her regular duty. As this report was complete, well rationalized and based upon a proper factual and medical background, it is entitled to that special weight and accordingly constitutes the weight of the medical evidence of record in establishing that appellant's accepted left metatarsal fracture had completely healed without residuals, that she could return to her regular job and that she needed no further treatment.

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁵ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

⁶ *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

Regarding appellant's accepted condition of pulmonary embolism, Dr. Sparks noted that appellant's treating physician, Dr. Boohaker, had discharged her from treatment and that her pulmonary embolism no longer caused any disability. The Board notes that there is no evidence to the contrary regarding appellant's pulmonary embolism, such that no conflict has arisen and, therefore, Dr. Sparks comments and Dr. Boohaker's statement constitute the weight of medical evidence on that subject.

As the weight of the medical evidence of record supports that appellant's left second metatarsal fracture has healed without residuals and that she no longer has any pulmonary embolism or deep vein thrombosis due to immobility, the Office met its burden of proof to terminate compensation. Appellant was properly notified of this preliminary determination and was given adequate time, within which to respond, however, no further medical evidence was forthcoming. The Office, therefore, properly finalized the termination.

The Board also finds that the Office properly declined to reopen appellant's case on its merits.

The Office's regulations pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), state as follows:

“(b) The application for reconsideration, including all supporting documents, must--

(1) Be submitted in writing;

(2) Set forth arguments and contain evidence that either;

(i) Shows that OWCP erroneously applied or interpreted a specific point of law;

(ii) Advances a relevant legal argument not previously considered by OWCP; or

(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”⁷

When a claimant fails to meet one of the standards contained in section 10.606(b), the Office will deny the application for reconsideration without reopening the case for review on the merits.⁸

In support of her August 13, 2002 reconsideration request, appellant argued that she was still being treated for her injury due to the problems she continued to experience. No further evidence or argument was submitted.

⁷ 20 C.F.R. § 10.606 (b)(1), (2).

⁸ See 20 C.F.R. § 10.608(b).

The Office considered appellant's argument and found it to be without basis, as the medical evidence of record had established that appellant had no continuing injury-related residuals. The Board now considers the argument and finds that it does not constitute a basis for reopening appellant's claim for further review on its merits. The Office properly denied appellant's request for reconsideration as she failed to show an erroneous application of law or present relevant argument or evidence not previously considered. Appellant has, therefore, not established that the Office abused its discretion by denying her request for reconsideration of its July 30, 2002 decision.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 23 and July 30, 2002 are hereby affirmed.

Dated, Washington, DC
November 14, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member